Supreme Court, U.S.
FILED
JAN 3 1990
JOSEPH F. SPANIOL, JR.
CLERK

(2)

NO. 90-870

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

SOCIETY NATIONAL BANK and JOEL A. PANDON,
Petitioners,

vs.

ROBERT WARREN and CAROLE Z. WARREN,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENTS, ROBERT WARREN AND CAROLE Z. WARREN, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a fully vested plan participant may recover damages for a plan fiduciary's failure to follow the participant's instructions, under an option provided for in the plan, for handling the participant's share of plan assets, which failure causes the loss of the valuable plan benefit of income deferral?

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STATEMENT OF THE CASE

Respondent Robert Warren ("Dr. Warren"), a physician, was employed by Westgate Medical Anesthesia Group, Inc. ("Westgate") and participated in Westgate's Pension Plan and Trust and Westgate's Profit Sharing Plan and Trust (the "Retirement Plans"). Petitioner Society National Bank ("Society") was the Trustee of the Retirement Plans. Petitioner Joel A. Pandon, a Society Trust officer, was one of the persons at Society responsible for the administration of the Retirement Plans.

At the time of his retirement in October 1984, Dr. Warren and his wife, Respondent Carole Z. Warren (collectively "Respondents") elected a lump sum distribution under an option available through the Retirement Plans and directed Society to transfer all of their assets from the

Retirement Plans to an Individual Retirement Account ("IRA") with Prescott, Ball & Turben, Inc. ("PBT"). The purpose of the transfer was to effect a rollover from the Retirement Plans to the IRA so that the assets would remain in a tax-deferred status. Society transferred a portion of the assets on December 5 and December 11, 1984, and transferred the balance of the assets on January 9 and May 23, 1985. Under the Internal Revenue Code, the transfer to the IRA would have been a tax-free rollover if accomplished within a single taxable year. Since the transfer occurred in two (2) different taxable years, it did not qualify as a lump sum distribution, and Respondents were subject to immediate taxation on the assets transferred in 1985. Society's failure to follow Dr. Warren's instructions directly resulted in the

loss of one of the most significant benefits available under the Retirement Plans, the benefit of income deferral.

Contrary to the implication from Petitioners' Statement of the Case, the claims review process under the Retirement Plans is irrelevant to these proceedings since there was no dispute as to Dr. Warren's entitlement to benefits. Dr. Warren was fully vested in the Retirement Plans and had been directing the investment of the funds in the Retirement Plans for some time. There was no dispute that a lump sum distribution was available under the Retirement Plans, and there was no dispute that Dr. Warren could elect a lump sum distribution. The "Summary Plan Description" for each plan contained the following language:

> (6) TREATMENT OF DISTRIBUTIONS Whenever you receive a distribution from the Plan, it will

> normally be subject to income taxes. However, you may reduce, or defer entirely, the tax due on your distribution through use of one of the following methods:
>
> (a) The rollover of all or a portion of the distribution to an IRA or another qualified employer plan. This will result in no tax being due until you begin withdrawing funds from the IRA or other qualified employer plan. BUT, the rollover of the distribution MUST be made within strict time frames (normally, within 60 days after you receive your distribution). Further, under certain circumstances all or a portion of a distributio may not qualify for this rollover treatment.
>
> . . .

Pursuant to this language, Dr. Warren elected to transfer his assets into the IRA, as a lump sum distribution thereby preserving their tax-deferred status. Petitioners simply failed to follow Dr. Warren's instructions.

Having lost this benefit, Respondents filed suit in District Court, seeking to recover their state and federal tax, their tax interest liability as well as the loss of their tax-deferred investment earnings. Their Amended Complaint charged that Petitioners' failure to transfer all of the assets in the Retirement Plans in 1984 constituted a breach of Society's fiduciary duty. Contrary to the assertions of Petitioners in their Statement of the Case, the Amended Complaint alleged at paragraphs 7 and 10 that the assets were to be transferred to an IRA.

In response to the Amended Complaint, Petitioners filed a Motion To Dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Specifically, Petitioners asserted that the damages Respondents were seeking were

extra-contractual and, as such, were not recoverable under ERISA. Respondents filed opposing briefs asserting that the damages claimed were not extra-contractual, but were direct damages caused by the loss of the benefit of income deferral afforded by the Retirement Plans.

Despite Respondents' arguments, the District Court granted Petitioners' Motion to Dismiss, holding that Respondents were seeking extra-contractual damages which are not recoverable under ERISA. Respondents appealed. The Sixth Circuit reversed the District Court's decision and remanded the case for further proceedings. In a well-reasoned opinion, the Court found no conflict between its decision and the holdings of other courts of appeal that have disallowed extra-contractual damages under §

502(a)(3) of ERISA, thus accepting Respondents' argument that they were not seeking extra-contractual damages.

SUMMARY OF THE ARGUMENT

This Court should not review the Sixth Circuit's decision because there is no conflict between that decision and the decisions of this Court or any other circuit or district court. The decision does not allow for the recovery of extra-contractual damages, but instead holds that "other appropriate equitable relief" is available to redress the loss of the contractually-available benefit of income deferral. In addition, the decision is not inconsistent with ERISA's plain language or its legislative history. Finally, this Court is precluded from reviewing Petitioners' argument that Respondents do not have standing to bring a civil action under ERISA, because Petitioners failed to raise that issue at any point below.

REASONS FOR DENYING THE WRIT

I. THE SIXTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH DECISIONS OF THIS COURT OR THE DECISIONS OF OTHER CIRCUITS OR DISTRICT COURTS.

This Court should not review the Sixth Circuit's decision because there is no conflict between that decision and the decisions of this Court or any other circuit or district court. In a well-reasoned opinion, the Sixth Circuit engaged in a lengthy examination of this Court's prior decision in Massachusetts Mutual Life Ins. Co. v. Russell, 473 U.S. 134 (1985). In Russell, this Court held that a fiduciary cannot be held liable to a plan participant or beneficiary for extra-contractual compensatory or punitive damages caused by improper or untimely processing of benefit claims. Petitioners' attempt to compare the

Russell case with the present case based upon the delay in processing a claim misses the mark. The issue for this Court is not the fiduciaries' conduct, but rather the nature of the damages caused by such conduct.

The Sixth Circuit found that its decision did not conflict with the majority decision in Russell and was supported by Justice Brennan's concurring opinion. There was no conflict with the majority opinion in Russell because the Respondents' claims differ from that of the plaintiff in Russell in two respects: (1) the nature of the alleged injuries and the relief sought, and (2) the statutory bases for the claim. Warren v. Society National Bank, 905 F.2d 975, 980 (6th Cir., 1990).

In the first place, the Warrens' claims are unlike the plaintiff's claims

in Russell. Therein, plaintiff made no claim that the fiduciary had violated a contractual duty. Rather, she sought extra-contractual compensatory and punitive damages for delays in providing disability benefits. In contrast, the Warrens claim that the petitioner violated a contractual duty under the Retirement Plans to distribute the plan assets in accordance with Dr. Warren's instructions. There was no dispute as to Dr. Warren's entitlement to benefits, as he was fully vested and had been directing the investment of his assets in the Retirement Plans for some time.

Under the Retirement Plans, a participant was allowed to elect a lump sum distribution. The Respondents' claims are a direct result of Petitioners' failure to comply with Dr. Warren's instructions for such distribution. The

Petitioners had a contractual duty to carry out those instructions, and they failed to do so. By acting negligently or in their own interest, Petitioners violated the prudent man standard of care under ERISA section 404(a), 29 U.S.C. § 1104(a) (1990).

The injuries Respondents claim also differ from the injuries which the plaintiff in Russell alleged. The Russell plaintiff did not seek damages for direct injuries, but instead sought punitive damages and damages for the consequential injuries of emotional distress and the necessity of cashing out her husband's retirement savings. Herein, Respondents incurred tax and tax interest liability and suffered the loss of investment earnings, all of which are direct injuries resulting from Petitioners' failure to follow Dr. Warren's instructions.

These injuries were directly caused by Petitioners' breach of their contractual duties.

Lastly, the statutory basis for Respondents' claims differs from the plaintiff's in Russell, in that Respondents brought this action pursuant to ERISA Section 502(a) (3), 29 U.S.C. § 1132(a)(3), claiming a cause of action under ERISA section 404(a)(1), 29 U.S.C. §1104(a)(1). In Russell, the action was brought pursuant to ERISA section 502(a)(2), 29 U.S.C. § 1132(a)(2) claiming a cause of action under section 409(a), 29 U.S.C. § 1109(a).

The decision of the Sixth Circuit is also supported by Justice Brennan's concurring opinion in Russell. Therein, Justice Brennan concluded that ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3) provides for an award of "other

appropriate equitable relief" for acts or practices that violate any provision of ERISA or the terms of the Retirement Plans, and a beneficiary can obtain "other appropriate equitable relief" whenever an administrator breaches the fiduciary duties set forth in ERISA section 404(a), 29 U.S.C. § 1104(a). Russell, 473 U.S. at 153 (Brennan, J., concurring). The provision for "other appropriate equitable relief" includes a provision for monetary damages for direct injuries caused by a breach of a contractual duty. See Powell v. Chesapeake & Potomac Telephone Co. of Va., 780 F.2d 419, 424 (4th Cir. 1985), cert. denied, 476 U.S. 1170 (1986). In the instant case, the Petitioners breached the fiduciary duties set forth in ERISA section 404(a) by failing to carry out Dr. Warren's instructions for a

lump sum distribution. Furthermore, under black letter trust law, which Congress intended to be incorporated into ERISA, Russell at 157 (Brennan, J., concurring), Respondents are entitled to a remedy that would put them in a position which they would have been in had Petitioners not committed a breach of trust.

The cases upon which Petitioners rely stand for the proposition that extra-contrctual damages are not recoverable under ERISA § 502(a)(3). The Sixth Circuit's decision does not conflict with these decisions because it does not allow the recovery of extra-contractual damages. For example, Respondents are not seeking punitive damages which the Courts have held are extra-contractual. See e.g., Varhola v. Doe, 820 F.2d 809 (6th Cir. 1987)

(punitive damages are not recoverable under § 502(a)(3) of ERISA). Similarly, Respondents are not seeking compensatory damages for consequential injuries such as emotional distress. See e.g., Drinkwater v. Metropolitan Life Insurance Co., 846 F. 2d 821 (1st Cir. 1988)(damages for emotional distress unavailable under ERISA because they are extra-contractual). See also Powell v. Chesapeake & Potomac Telephone Co. of Va., 780 F.2d 419(4th Cir. 1985), cert. denied, 476 U.S. 1170 (1986); Sokol v. Bernstein, 803 F.2d 532 (9th Cir. 1986). This case is different.

Although the Petitioners distributed all of Respondents' assets, those assets were distributed contrary to Petitioners' contractual duty and Respondents' instructions. As a result, Respondents failed to receive the full value of the

assets to which they were entitled. Inasmuch as the damages Respondents suffered flowed directly from Petitioners' breach of contract, they are not extra-contractual damages which other courts have declined to award. The Petitioners, through their negligence or for their own purposes, acted in such a way as to deprive Respondents of a benefit to which they were entitled under the Retirement Plans.

II. THE DECISION BELOW IS NOT INCONSISTENT WITH ERISA'S PLAIN LANGUAGE AND ITS LEGISLATIVE HISTORY.

There is nothing in the decision of the Sixth Circuit which is inconsistent with ERISA's plain language or its legislative history. ERISA section 502(a)(3) provides in pertinent part:

> A civil action may be brought...

> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan.

The Sixth Circuit concluded that by using the phrase "other appropriate equitable relief," Congress expressly provided for equitable remedies other than injunctive relief. In addition, Congress intended to incorporate black letter trust law into ERISA. Russell at 157 (Brennan, J., concurring). It is well established that equitable relief includes monetary damages. See e.g., Walters v. Marathon Oil Co., 642 F.2d 1098, 1100 (7th Cir. 1981); Goldberg v. Medtronic, Inc., 686 F.2d 1219, 1229 (7th Cir. 1982). See also Restatement (Second) of Trusts § 205, and Comment a (1959).

To hold that the language "equitable relief" is limited to injunctive relief or a "declaratory judgment" would render the language of the statute redundant. ERISA section 502(a)(3)(A) already provides for injunctive relief, and it would be redundant to read injunctive relief into section 502(a)(3)(B) as well. As a result, the Sixth Circuit concluded that the term "other appropriate equitable relief" implies a broad range of remedies, including monetary damages. In so holding, the Court below recognized that it is the historic purpose of equity to secure complete justice, and courts may adjust their remedies so as to grant necessary relief. Walters, 642 F.2d at 1100; United States v. Martinson, 809 F.2d 1364, 1367 (9th Cir. 1987).

III. THIS COURT IS PRECLUDED FROM REVIEWING PETITIONERS' ARGUMENT THAT RESPONDENTS DO NOT HAVE STANDING TO BRING A CIVIL ACTION UNDER ERISA BECAUSE PETITIONERS FAILED TO RAISE THAT ISSUE AT ANY POINT BELOW.

This Court is without jurisdiction to review Petitioners' erroneous argument that Respondents lack standing to sue under ERISA. Prior decisions of this Court make it clear that Petitioners' failure to raise an issue regarding Respondents' standing either before the District Court or in the Court of Appeals bars this Court from reviewing that issue on certiorari.

Petitioners twice concede that the Sixth Circuit did not address the Warrens' standing in its Opinion. (Petition for a Writ of Certiorari at pp. 23, 25). A review of the briefs submitted to the Court of Appeals further demonstrates that Petitioners never raised that issue

nor was it briefed before the Sixth Circuit.[1] These facts alone are sufficient to divest this Court of jurisdiction to entertain Petitioners' fourth argument. In Adickes v. S.H. Kress & Co., 398 U.S. 144, 147 n.2 (1970), this Court affirmatively stated that it will not consider an issue which was "neither raised before nor considered by the Court of Appeals...." The facts in the present case are, however, even more compelling.

Despite ample opportunity to do so, Petitioners never raised a question of standing in any of the multiple briefs they filed in the District Court. Specifically, Petitioners passed up five

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[1]Petitioners did not raise an issue of standing in either the Brief of Appellees, Appellees' Additional Supporting Citation, or Appellees' Petition for Rehearing and Suggestion for Rehearing en banc.

(5) other chances to press that issue before Judge Aldrich; they did not mention it in the Brief In Support of their original Motion to Dismiss, the Reply Brief to Plaintiffs' Brief In Opposition to Defendants' Motion to Dismiss, the Brief in Support of Defendants' Motion to Dismiss Plaintiffs' Amended Complaint, Defendants' Reply Brief to Plaintiffs' Brief in Opposition to Defendants' Motion to Dismiss Plaintiffs' Amended Complaint, or Defendants' Surreply Brief in Support of Defendants' Motion to Dismiss Plaintiffs' Amended Complaint. In addition to the glaring omission of a standing argument in any of these briefs, Respondents naturally never pled or briefed such an issue before the District Court, which furthermore did not consider the issue sua sponte. On these facts, this Court's holding in Tennessee

v. Dunlap, 426 U.S. 312 (1976) is dispositive:

> This assertion was not pleaded in respondent's complaint, was not considered by the District Court or the Court of Appeals, and accordingly is not before us.

Id. at 316 n.3. See also Miree v. Dekalb County, Georgia, 433 U.S. 25, 34 (1977) (Court refused to consider tardy claim of violation of federal statute which was "neither pleaded, argued, nor briefed either in the District Court or the Court of Appeals...."). In dismissing a writ improvidently granted on a petition presenting questions regarding the constitutional limits on the State's authority to try a person in absentia, this Court expressly stated that "[w]e cannot decide issues raised for the first time here." Tacon v. Arizona, 410 U.S. 351, 352 (1973) (citing Cardinale v.

Louisiana, 394 U.S. 437 (1969)). In view of this authority, Petitioners' fourth argument does not provide a basis upon which this Court can grant certiorari.

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request this Court to deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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